

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES of AMERICA,

4 -against-

16 Cr. 832 (KMK)
Hearing

5 NICHOLAS TARTAGLIONE,

6 Defendant.

7 -----x
8 United States Courthouse
9 White Plains, New York

10 November 21, 2017

11
12 B e f o r e: THE HONORABLE KENNETH M. KARAS,
13 District Court Judge

14
15 A P P E A R A N C E S:

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18 the Southern District of New York
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1 THE CLERK: The Honorable Kenneth M. Karas presiding.
2 United States of America versus Nicholas Tartaglione.
3 16CR832. Counsel, please state your appearances.

4 MS. COMEY: Good afternoon, your Honor.
5 Maurene Comey for the government.

6 THE COURT: Good afternoon, Ms. Comey.

7 MR. BARKET: Good afternoon, your Honor.

8 Bruce Barket, Donna Aldea, Aida Leisenring and Mark
9 DeMarco for Mr. Tartaglione.

10 THE COURT: All right. Good afternoon to you all.

11 MR. GOLTZER: Good afternoon, sir. George Goltzer
12 and Ying Stafford for Mr. Biggs.

13 THE COURT: Sorry about the screen.

14 MR. DEMARCO: That's okay, Judge.

15 THE COURT: Was it up when you came in?

16 MR. DEMARCO: Yeah. It was up. I just figured I've
17 got to lower it.

18 THE COURT: Okay.

19 MR. DEMARCO: We're good.

20 THE COURT: All right. I think that belongs to your
21 office. Not your responsibility.

22 MS. COMEY: Yes, your Honor.

23 THE COURT: I don't want to dime out the person who
24 did it, but his last name rhymes with "Ember."

25 MS. COMEY: I believe the IT specialist who's

1 responsible for that is out sick today, your Honor.

2 THE COURT: No. It's Dember's fault. Don't shift
3 the blame.

4 All right. So we're here on a motion to compel
5 disclosure of information. I have read the papers. I don't
6 know who wants to argue on behalf of Mr. Tartaglione.

7 MS. ALDEA: I'll be arguing, your Honor.

8 THE COURT: All right. Good afternoon.

9 MS. ALDEA: Good afternoon, your Honor.

10 THE COURT: Good afternoon.

11 MS. ALDEA: As Bruce said, my name is Donna Aldea.
12 This is my first appearance here, so I'm saying hello formally.
13 First physical appearance.

14 THE COURT: Welcome.

15 MS. ALDEA: I know you've read the material. The way
16 that I'm going to structure the argument is I'm going to start
17 by showing that this really is *Brady* material. I think that's
18 one of the main points of contention.

19 Second, that the Government's disclosure that they've
20 made so far, which is the content but without any witness names
21 and without the specific statements, is not sufficient to
22 satisfy their *Brady* obligations.

23 And, finally, that under the circumstances of this
24 case, this Court should, in fact, order disclosure now and that
25 this Court clearly has the authority to order disclosure right

1 now of this material.

2 So first with respect to the question of whether
3 there is *Brady* material. All that's required is that this be
4 material to guilt or punishment, and in this case, it clearly
5 is material to both. On this point, with respect to the
6 materiality to guilt, there's no question that statements,
7 witness statements that show that Mr. Tartaglione was not
8 present at the time that three of the victims were shot, and
9 that Mr. Tartaglione, obviously, did not fire the weapon is
10 exculpatory.

11 THE COURT: Can I just interject?

12 MS. ALDEA: Of course.

13 THE COURT: At least in the original papers, there
14 was sort of two layers to this. There was *Brady*-like material
15 that would be material to your presentation to the Justice
16 Department.

17 MS. ALDEA: Correct.

18 THE COURT: And then of course there's the trial,
19 right that is actually *Brady* violation of *Brady* material. Are
20 you approaching both of these?

21 MS. ALDEA: Yes, your Honor.

22 THE COURT: Okay. So, okay, I just want to make sure
23 I'm clear on that.

24 All right. Go ahead.

25 MS. ALDEA: So in that order, I'll actually start

1 with respect to the DOJ internal capital review case process.
2 So the government stated in its materials, in its opposition,
3 that *Brady* does not apply here and, in fact, it actually, a
4 quote, that the government said that a request for *Brady*
5 material for this purpose has no legal basis.

6 THE COURT: They cite some cases that are to that
7 effect.

8 MS. ALDEA: Correct. They cite two cases.

9 THE COURT: Right.

10 MS. ALDEA: They cite two district court cases that
11 are not directly point; *United States versus Roman*, and *United*
12 *States versus McVeigh*. They're two 1996 cases.

13 Now, in addition to the materials that we initially
14 cited for this proposition in preparation for oral argument --

15 THE COURT: Yes.

16 MS. ALDEA: -- there are dozens of cases that hold to
17 the contrary. One that I'd like to highlight, *United States*
18 *versus Jackson*, is a Southern District case decision by this
19 Court that is from 2003, where the Court specifically said that
20 under Department of Justice procedures, defense counsel is
21 entitled to make submissions to both the US Attorney and the
22 Department of Justice, arguing that the Attorney General's
23 discretion should be exercised against seeking the death
24 penalty and then clearly held that in these circumstances
25 penalty determination relevant material within the scope of

1 *Brady versus Maryland* and its progeny, must be produced in time
2 to be used in defense counsel's argumentation against pursuit
3 of the death penalty to both the United States Attorney and the
4 Department of Justice.

5 THE COURT: So *Brady* is a trial right that your
6 client has; correct?

7 MS. ALDEA: Well, it's a right to material. It's a
8 due process right.

9 THE COURT: But it's a due process right that relates
10 to trial. So that, as we know from Judge Cabranes's analysis,
11 the tricky thing for a prosecutor is the test as to whether or
12 not there's a *Brady* violation happens after the trial.

13 MS. ALDEA: Correct.

14 THE COURT: The prosecutor is warned not tap too
15 closely to the danger line, but at the end of the day that is
16 the test.

17 MS. ALDEA: Well, that, I would like to address in
18 the third portion of it, which is respect to the timing --

19 THE COURT: But it's a trial right.

20 Put it this way, if the government fails to produce
21 *Brady* material in a case where the defendant is acquitted, is
22 there a *Brady* right violation?

23 MS. ALDEA: So it's not entirely a trial right, I
24 guess I disagree with that.

25 THE COURT: If you could just answer my question.

1 MS. ALDEA: Yes.

2 THE COURT: If somebody is acquitted and they claim
3 after the trial and the government failed to produce Brady
4 material after, is there a due process violation?

5 MS. ALDEA: If somebody is acquitted --

6 THE COURT: Yes, right.

7 MS. ALDEA: -- no. There is not.

8 THE COURT: Because at the end of the day, the result
9 of the trial wasn't changed --

10 MS. ALDEA: Correct.

11 THE COURT: -- by the failure to produce *Brady* --

12 MS. ALDEA: Correct.

13 THE COURT: -- which makes it a trial right.

14 MS. ALDEA: Well, no, the result was not changed.

15 The reasoning behind all these cases --

16 THE COURT: As a result of the trial.

17 MS. ALDEA: Well, but the reasoning behind all these
18 cases dealing with materiality to guilt or punishment, if the
19 government in this case decides as a result of the DOJ
20 review --

21 THE COURT: Yes.

22 MS. ALDEA: -- not to seek the death penalty --

23 THE COURT: Yes.

24 MS. ALDEA: -- there is no more compelling thing that
25 will change the outcome of this litigation; the outcome of the

1 proceedings.

2 THE COURT: Right. But the question is, what rights
3 does someone have with regard to the DOJ process, because the
4 DOJ process, which is really the bureaucratic means by which
5 the prosecution decides to exercise its discretion to seek the
6 death penalty.

7 MS. ALDEA: Correct.

8 THE COURT: And there's no Constitutional right to
9 the DOJ process that they have in place; right?

10 I mean, Ms. Comey, if she wanted to, if she have the
11 authority, could say, I have decided on behalf of the United
12 States government to seek death penalty here, and that's it and
13 that's how we go forth.

14 The fact is that the DOJ has its own system in place,
15 but not because the Constitution compels it.

16 MS. ALDEA: Well, but, your Honor, that's not what
17 the case law has held.

18 THE COURT: I know, but the case law is not binding
19 so what I want to know is where in the Constitution do you
20 think there's a right to the process that's even in place?

21 MS. ALDEA: There may not -- to the extent that there
22 is a procedure that is put in place, the Constitution gives the
23 defendant the right to due process. In other words, the
24 ability to take advantage of that procedure.

25 THE COURT: Process, okay, so you're talking about

1 procedural due process?

2 MS. ALDEA: Correct.

3 THE COURT: So procedural due process is the process
4 that's due; right? And where in the Constitution, where is
5 there any authority that says that the process that your
6 client's due is the DOJ process that they had put into place?

7 MS. ALDEA: Well, I mean, I can't point to the
8 Constitution except broadly for due process considerations.

9 THE COURT: But are you saying that the Constitution
10 compels the process that the Justice Department uses?

11 MS. ALDEA: The Constitution does not compel that
12 process.

13 THE COURT: They don't have to have that process.

14 MS. ALDEA: Correct. I agree with your Honor;
15 however, once that process is the put into place, the reasoning
16 of the decision that I read you, the Southern District decision
17 that I read to you, is essentially that. That because, under
18 the procedures that the Department of Justice puts in place,
19 the defense counsel is entitled to make submissions, and
20 because prior to deciding whether to request approval to seek
21 the death penalty the United States Attorney should give
22 counsel for the defendant a reasonable opportunity -- I'm
23 reading from the case.

24 THE COURT: No, I understand, but that presupposes an
25 entitlement. I mean, the due process clause applies when there

1 is some entitlement. If the Justice Department announced
2 tomorrow it's scrapping its capital review process as it now
3 exists, how would that violate the Constitution?

4 MS. ALDEA: If there is no process that is available,
5 then there obviously wouldn't be an ability for the defense to
6 make the submission in the first place --

7 THE COURT: Right.

8 MS. ALDEA: -- and there could be no change in the
9 outcome of the proceedings as a result of that.

10 THE COURT: Right. So in other words --

11 MS. ALDEA: But if the process is available --

12 THE COURT: But the process is not something that
13 your client is entitled to. It's something that the government
14 gives to everybody who's potentially eligible for the death
15 penalty by virtue of it's own decision, but it's not something
16 that creates an entitlement.

17 MS. ALDEA: So in other contexts, just arguing
18 broadly --

19 THE COURT: Yes.

20 MS. ALDEA: -- in other contexts where there is no --
21 there is not a constitutional entitlement to a hearing for
22 certain civil proceeding, for instance --

23 THE COURT: Yes.

24 MS. ALDEA: -- nonetheless, when those proceedings
25 are held, courts have found that there is still due process

1 that attaches to ensure --

2 THE COURT: Not when there's no entitlement. Not
3 when there's no entitlement.

4 So, for example, in the zoning context, if somebody
5 says that I wanted to change the zoning of my property and I
6 wasn't given the process I was due, and the courts uniformly
7 say when there's no entitlement to the benefit you seek, then
8 there's no process that you are due under the due process
9 clause.

10 MS. ALDEA: Yes, but when there is -- the entitlement
11 is not a Constitutional entitlement, but there is, nonetheless,
12 a procedure that has been put in place.

13 THE COURT: That's gratuitous.

14 MS. ALDEA: I'll answer the question another way from
15 a different case.

16 the couret: Yeah.

17 MS. ALDEA: And this one, aside from the Southern
18 District case, there's another case that's also directly on
19 point. And, again, there are literally dozens of these cases.

20 THE COURT: None of which is cited in your reply
21 letter.

22 MS. ALDEA: Correct, your Honor.

23 THE COURT: So in the future it would be useful.

24 MS. ALDEA: Yes, your Honor.

25 THE COURT: I read the cases you tell me to read.

1 MS. ALDEA: And as I said, I did cite some of these
2 cases in the initial submission. As I was preparing for oral
3 argument, I actually found more cases when I was contemplating
4 that we might have a discussion about this point.

5 THE COURT: Yes.

6 MS. ALDEA: The other case is *United States versus*
7 *Delatorre* and it approaches it from a slightly different angle.
8 This is a 2006 case from the Northern District of Illinois that
9 ordered production of all *Brady* and Rule 16 discovery
10 preauthorization. And in that case, what the court found, is
11 the court said that even though the USAM does not create
12 substantive rights, as your Honor is a saying; however, the
13 defendants still have the right to discovery, District Courts
14 have broad discretion with respect to the discovery motions in
15 criminal cases, and this Court agrees that the exigencies of
16 capital litigation compel, as a practical matter, in order to
17 ensure the fair and orderly disposition of the case, prompt
18 disclosure of all information which will affect the choice of
19 penalty. As several defendants here are presently subject to
20 the possible sentence of death, the courts says this warrants
21 especially careful treatment as capital punishment is
22 qualitatively different than any other form of punishment.

23 So to answer your question from that perspective,
24 which is a slightly different tact than the Eastern District
25 took -- sorry, the Southern District took in the prior case,

1 part of it is due process is heightened due process in this
2 context because we have a capital case. So death is different.
3 That's number one.

4 Number two is that the questioned that your Honor is
5 asking about whether or not there's constitutional entitlement
6 is different from the question of whether your Honor has the
7 authority and ability in the exercise of your discretion to
8 order the discovery. So I agree with you that there is no --
9 and *Delatorre* would agree with you -- there is no substantive
10 right that is created.

11 THE COURT: Right.

12 MS. ALDEA: However, because heightened due process
13 applies, because this is a capital case, because this decision
14 is the single-most decision that is going to be made, probably
15 throughout the entire course of this litigation, this Court
16 should, as these other courts have, exercise its discretion to
17 order the discovery for this purpose.

18 THE COURT: So when you say the discovery, the
19 question is what does that mean? Is it the discovery or is it
20 the information? Because the information about your client's
21 absence when the other three gentlemen were shot, you had been
22 given that information.

23 MS. ALDEA: Correct.

24 THE COURT: So that fact has been given to you.

25 MS. ALDEA: Correct. So now --

1 THE COURT: So let's put that to the side for a
2 second. Let me ask you a question.

3 To the extent the government is saying that its
4 theory of the case is that Mr. Tartaglione was there for the
5 shooting of the first individual, and then left, and was not
6 there for the shooting of the other three individuals, why is
7 information that is consistent with that *Brady*?

8 MS. ALDEA: Okay. So the first thing is, there was
9 no shooting of the first individual, so the first --

10 THE COURT: The first individual, whatever happened
11 to the first individual. The point is, the three individuals
12 who were shot, your client's not there for, which the
13 government says is precisely its theory of the case.

14 MS. ALDEA: Well, so here's the thing --

15 THE COURT: Forgetting what they said in May. What
16 the government is saying right now is its theory of the case is
17 whatever happened with the first individual, the other three
18 who were shot, your client was not present when that happened.

19 MS. ALDEA: Correct.

20 THE COURT: That's their theory of the case.

21 MS. ALDEA: Well, that's their adopted theory of the
22 case.

23 THE COURT: That's their theory of the case.

24 MS. ALDEA: Okay.

25 THE COURT: Okay? So, if that's their theory of the

1 case, what's *Brady* about them telling you that that's their
2 theory of the case?

3 MS. ALDEA: So the Supreme Court has repeatedly drawn
4 the difference between a legally sufficient case and what
5 constitutes exculpatory material or materiality for purposes of
6 *Brady*.

7 THE COURT: Of course. Right.

8 MS. ALDEA: So the way that I would distinguish that
9 is this: If evidence tends to be benefit the defense, in
10 other words, if evidence is material to the issue of guilt or
11 punishment, then it constitutes *Brady* material. So in this
12 case, the reason that it would be material, it's going to be,
13 in truth, the focal point of the entire defense of this case.
14 Probably the single-most probative fact to Mr. Tartaglione's
15 distancing from the conspiracy, to the fact that he did not act
16 in an aiding and abetting fashion, or as an accomplice to the
17 homicides of at least three of the victims in this case that
18 were shot.

19 THE COURT: Right.

20 MS. ALDEA: And to all the charges that specifically
21 target the use of a firearm, because he's charged specifically
22 with those three. The focal point of the defense is going to
23 be, he wasn't present when this happened --

24 THE COURT: Right.

25 MS. ALDEA: -- so he couldn't have shared in the

1 intent, and he didn't pull the trigger. So he didn't commit
2 the act. That goes to the guilt as opposed to the punishment
3 phase.

4 THE COURT: Sure.

5 MS. ALDEA: So because of that, this information is
6 exculpatory. Now in the prosecution --

7 THE COURT: No. Wait. Wait. Wait. Wait. Wait.
8 Wait. Let's stop.

9 At this point, what's the difference between your
10 theory of the case and the government's theory of the case?

11 MS. ALDEA: Well, the difference between the theory,
12 I guess, is that the Government's theory is that in spite of
13 his absence --

14 THE COURT: Right.

15 MS. ALDEA: -- they have other proof available to
16 him that to show that he nonetheless commanded, importuned,
17 aided, abetted, whatever it is --

18 THE COURT: The key fact, from your perspective, is
19 your client's absence from the other three that were shot.

20 MS. ALDEA: Correct.

21 THE COURT: The government says exactly that is, we
22 agree with that fact. So if that's the key fact from your
23 perspective, and the government agrees with that key fact,
24 where is there daylight between your theory as to where your
25 client was when these three individuals were shot, and the

1 government's theory as to where your client was when these
2 three individuals were shot?

3 MS. ALDEA: But that's not what *Brady* material
4 requires.

5 THE COURT: Answer the question.

6 Where's the daylight between those two?

7 MS. ALDEA: Both of us agree, at this point --

8 THE COURT: Yes.

9 MS. ALDEA: -- that he was not present when they were
10 shot.

11 THE COURT: Okay. And that's a fact that you want
12 information, you want the source of that information.

13 MS. ALDEA: Correct, your Honor.

14 THE COURT: But you have the fact itself that your
15 client wasn't there when these three individuals were shot.

16 MS. ALDEA: Okay.

17 THE COURT: So I don't understand how it's
18 exculpatory when it's the government saying that that's
19 consistent with their theory of the case.

20 MS. ALDEA: Being consistent with their theory
21 doesn't mean that the information doesn't have exculpatory
22 value, and I'll answer it with an example from another case.

23 THE COURT: It may have exculpatory value, but you
24 have the information that he wasn't present when the other
25 three were shot.

1 MS. ALDEA: But the information that we have is not
2 sufficient, because it lacks the specificity that would be
3 required.

4 THE COURT: He wasn't there when they shot; what else
5 are you entitled to in terms of what's *Brady*? You're not
6 entitled to why the government thinks he's nonetheless still
7 guilty.

8 MS. ALDEA: No.

9 THE COURT: Right? If their theory is --

10 MS. ALDEA: No. No, no.

11 THE COURT: If their theory is that he aided and
12 abetted in some other way or he commanded in other way, I don't
13 know what their theory is, they're not required to share that
14 with you because that's inculpatory.

15 MS. ALDEA: Correct, your Honor, I agree.

16 THE COURT: So I don't understand what fact you're
17 missing, because the material fact is he's not there. They say
18 that he's not there. That's part of their theory of the case.

19 So what other information, in terms of information --
20 not the source of the information -- what other information do
21 you think is exculpatory in that regard?

22 MS. ALDEA: Well, the statements themselves are
23 information that we would be entitled to with specificity as
24 well as the source.

25 THE COURT: Why? Why?

1 The statement of he wasn't there is the same as the
2 information the government provided you that he wasn't there.

3 MS. ALDEA: Because the precise statement that is
4 used is the statement that would contain the investigative
5 leads that would allow us to follow it.

6 THE COURT: Let's just say that I don't know what the
7 basis entirely of the government's saying they know he wasn't
8 there. Let's assume it is a statement of the individual; he
9 wasn't there, he left.

10 Okay. He wasn't there. He left. Let's assume
11 that's the case. So you've been told that. So all you want is
12 the source of the information which doesn't add anything to the
13 fact that he wasn't there.

14 MS. ALDEA: Well -- so in *Leka versus Portuondo*,
15 which is a Second Circuit case --

16 THE COURT: Yes, I read it.

17 MS. ALDEA: The court dealt specifically with the
18 prosecution told the defense that a witness who had seen the
19 shooting and could identify the defendant.

20 THE COURT: Yes.

21 MS. ALDEA: And then subsequently nine days before
22 the opening, 23 days before the defense case, the prosecution
23 told the defense this witness can't make an identification.
24 And the court found that the absence of the name of that
25 witness disclosed at a time when the defense could actually

1 make use of it, and the absence of the specific content of what
2 the witness said, in other words, the entire statement, was
3 essential and should have been disclosed under *Brady*. The
4 district court said --

5 THE COURT: That's not this case. That's not this
6 case.

7 MS. ALDEA: But, your Honor --

8 THE COURT: That's not this case.

9 MS. ALDEA: It may be.

10 THE COURT: What you have is the fact that he wasn't
11 there. That's the key fact. And anyways, what you're not
12 grasping is, that is the government's theory of the case. So I
13 still don't understand what else you think -- the government
14 says it complied with its *Brady* obligation. They've told you
15 this fact, which they say anyways is consistent with their
16 theory of the case, so you want more, but I don't understand
17 why you think you're entitled to more.

18 MS. ALDEA: The government's theory of the case is it
19 is a weakness in the government's case that he is not there.

20 THE COURT: Which they've conceded or acknowledged.

21 MS. ALDEA: I understand.

22 So but with respect to the first question, the fact
23 that they're saying we can prove that he aided and abetted and
24 was responsible, notwithstanding the fact he wasn't there --

25 THE COURT: Which is not a radical concept, but, yes.

1 MS. ALDEA: Well, it's not. But that doesn't mean
2 that we're not entitled to the exculpatory information that
3 shows that, in fact, he was not there, who said it, the context
4 in which they said it and what they said.

5 THE COURT: Why are you entitled to who said it?
6 Why are you entitled to who said it?

7 MS. ALDEA: Because --

8 THE COURT: You're entitled to know that he wasn't
9 there. You've been told that. Why are you entitled to who
10 said it? Assuming that that's the basis of their knowledge.

11 MS. ALDEA: Because what we're entitled to under
12 *Brady* is a level of specificity that affords the defense an
13 opportunity for use and that is an opportunity for a
14 responsible lawyer to use the information with some degree of
15 calculation and forethought. It can't just be a conclusion; he
16 wasn't there. It needs to be enough to allow us, in this case,
17 and in *Leka*, actually, where the name was at issue, to go and
18 conduct an investigation; to question the witnesses that may
19 have provided the information; to question the sources that
20 they may have given that information to.

21 When all we have is the statement, it's like
22 saying -- it's like saying that the government has told us,
23 look, we acknowledge that the defendant didn't pull the
24 trigger. If we don't know why they know that he didn't pull
25 the trigger, we don't know who told them that he didn't pull

1 the trigger. We can't conduct an independent investigation of
2 that to elicit investigative leads that will ultimately show
3 the fact that he didn't pull the trigger also shows that he's
4 not responsible for the killing.

5 So having the information without context, having the
6 information without names, makes it useless and that's why --

7 THE COURT: That is, counsel, that is such an
8 exaggeration. I mean, that is such an exaggeration, and you
9 really don't have any case that says you're entitled to that
10 broad a right, because otherwise you would have a plethora of
11 cases that say, every time the government reveals information
12 that's exculpatory, they have to reveal the source of the
13 information. You don't have a case that says that.

14 There's no *per se* rule that says you have to tell us
15 the source of the exculpatory information. There's no case
16 that says that.

17 MS. ALDEA: There's no case that says that. I agree
18 with your Honor.

19 THE COURT: Okay.

20 MS. ALDEA: However, the question, again, and I have
21 to draw this distinction, there's a question -- there's a
22 difference between the issue of whether we have a
23 Constitutional right to it in the sense that we have to be
24 given that information now, and whether your Honor has the
25 discretion to order it, because under the circumstances of the

1 case, it would ultimately run the risk of tacking too close to
2 the wind, as your Honor had said before.

3 THE COURT: Yeah.

4 MS. ALDEA: Or would ultimately run the risk of
5 depriving the defendant ultimately of his due process right to
6 a fair trial.

7 Now what I would say is that with respect to the case
8 that so holds, *Leka* is probably the best case on point. And
9 the reason that I say that is in *Leka*, what the Second Circuit
10 found in reversing the district court's decision, is that the
11 failure of the prosecution to actually give the name of the
12 witness until just before trial; the failure of the prosecution
13 to disclose exactly what the witness saw, instead of just the
14 general proposition that he can't make an identification, that
15 that deprived the defense of his rights -- the defendant of his
16 rights under *Brady*.

17 And, again, the reason that it makes sense here when
18 we look at the totality of the circumstances that we have
19 presently -- and this goes kind of to the third question which
20 your Honor alluded to at the beginning of do we look at this
21 from the appellate retrospective standpoint --

22 THE COURT: Yes.

23 MS. ALDEA: -- or do we look at it from the
24 standpoint of where we're standing today? I can't tell you. I
25 mean, in some ways I'm arguing with one hand tied behind my

1 back. I don't know what the statements say. I'm grateful that
2 the government has agreed to provide the statements to your
3 Honor for *in camera* review and confident that you'll look at
4 them, in light of everything we're discussing here today and
5 make the determination of whether they should be disclosed the
6 determination of materiality. But I am arguing with one hand
7 behind my back because I don't knows what the statement says.

8 THE COURT: That's the very true. Right.

9 MS. ALDEA: The second part of it is that we're
10 all --

11 THE COURT: Assuming that the basis for the
12 government's disclosure was a statement or statements.

13 MS. ALDEA: Correct. Assuming. And I'm making that
14 assumption.

15 Now, there is something that the government said in
16 one of its disclosures that actually suggested that it was a
17 statement, which is part of the reason that I'm making -- I'm
18 drawing that assumption.

19 THE COURT: Sure, no, I understand.

20 MS. ALDEA: Now, the second part of it is, the other
21 reason I have one hand tied, I guess, more tightly behind my
22 back, is because in this case -- and this is something that all
23 of us share, we don't have the benefit of a retrospective
24 analysis, the benefit of hindsight, to say what impact did this
25 ultimately have on the prosecution of this case and on the

1 defense in this case.

2 So all we have -- and this is what the Second Circuit
3 in *United States versus Coppa* actually instructed trial courts
4 to look at -- the Second Circuit said, look, all you can do is
5 look at the circumstances that are available.

6 Now, in this case, here are the circumstances and
7 that's why the disclosure is so important. In this case, we
8 have witnesses, some of whom don't live in the country. In
9 this case, we have people who are transients, who are going to
10 be difficult to locate. In this case, we have a situation
11 where the longer we wait, the more likely it is that the leads
12 that the defense can follow and the leads that the defense can
13 obtain, will disappear.

14 THE COURT: But what you have is you have the
15 information your client wasn't present when these three
16 individuals were shot. So you have that lead. You have that.
17 And so if you want to interview people you are worried are
18 going to leave the country or going to actually have health
19 issues, or whatever it is, you've got what you need to say,
20 okay, where were you? Was our client there? Where was he?
21 Where did he go? I mean, you have to that.

22 So whether or not you know the source, assuming,
23 again, that it's based on statements of this information, you
24 have what the source is telling the government.

25 MS. ALDEA: Well, we have -- all we have -- we don't

1 necessarily have everything the source is telling the
2 government. What we have is he wasn't there. I don't know if
3 the statement includes additional information. Your Honor can
4 make that determination as to how the person knows he wasn't
5 there; how the person knows that he left; why the person has
6 this information.

7 THE COURT: You have the key fact. And at the end of
8 the day, you have enough to go talk to people who you think
9 might be witnesses that would corroborate that fact; who would
10 know where he was.

11 But let's step back for a second. So we mentioned
12 that there are two layers to this. There is what you want to
13 be able to tell the Justice Department capital review folks and
14 of course the trial right.

15 *Brady* is all about enlightenment; right? *Brady* says,
16 if the government has information that can help your client, as
17 to guilt or punishment, and it's uniquely in possession of the
18 government, then it has to tell you as a matter of
19 Constitutional law.

20 MS. ALDEA: Right.

21 THE COURT: To enlighten you so you can then pursue
22 those leads. So there's a couple layers to that.

23 One is it has to be uniquely within the government's
24 possession, right, because -- let's say it turns out it's
25 material to your defense and it was raining the night of the

1 incidents in question and, okay, the government might know that
2 it wasn't raining and that could be *Brady*, but you could find
3 that out yourself. That's not something that's uniquely within
4 the possession of government. So the government has no
5 obligation to enlighten you.

6 Here, the object of the enlightening, here being the
7 Justice Department Review Committee, is you want to be able to
8 enlighten them about things that are mitigating factors that
9 they should consider and, therefore, not authorized the death
10 penalty be sought here; right?

11 MS. ALDEA: Correct.

12 THE COURT: So if the government has the information
13 that Ms. Comey has about the fact that your client wasn't there
14 when the three individuals were shot, how are you going to
15 enlighten them when they tell you what they know about where he
16 was?

17 MS. ALDEA: Well, again, I'm not sure exactly what
18 they know but --

19 THE COURT: Whatever they know, they know.

20 MS. ALDEA: Correct.

21 THE COURT: So you're not going to add to that.

22 Having them say, here are the following sources of
23 the fact that we acknowledge Mr. Tartaglione wasn't present
24 when these three individuals were shot, so you can then
25 regurgitate that back to them --

1 MS. ALDEA: No, it would be --

2 THE COURT: -- so, here's what we know?

3 MS. ALDEA: No. It would be so that we can conduct
4 an investigation; speak to those witnesses; speak to people
5 that might have known that; speak to people that they might
6 have spoken to --

7 THE COURT: To say that he wasn't there.

8 MS. ALDEA: No, to get information about -- so if he
9 wasn't there, not being there is one thing. That still allows
10 the government to proceed with their case that he may somehow
11 be responsible.

12 THE COURT: Right.

13 MS. ALDEA: However, the person who knows that he
14 wasn't there also knows what he said before he left. The
15 person who knows that he wasn't there --

16 THE COURT: Right, which they -- if they presumably
17 have talked to that person or people. I mean, that's my point,
18 is that whatever you could find out from this person, assuming
19 you can even talk to this person or people, they've done that.
20 And so I don't know what you're adding, what enlightenment
21 there is to the capital punishment.

22 MS. ALDEA: Yes. I understand your question.

23 So here's the difference. When a prosecutor asks a
24 witness questions, the reasons for asking the questions is to
25 get proof or evidence of guilt. In other words, the questions

1 are directed -- people answer the questions that they're posed.
2 I'm not using that as an aspersion --

3 THE COURT: Let's back up for a second.

4 MS. ALDEA: Yes.

5 THE COURT: But I think we should give prosecutors a
6 little more credit. Presumably the prosecutors ask people
7 questions to find out what happened.

8 MS. ALDEA: Correct, your Honor. I was a prosecutor
9 for 15 years, I do give credit, I do.

10 THE COURT: So you know, your job was to find out
11 what happened.

12 MS. ALDEA: Absolutely.

13 THE COURT: Okay.

14 MS. ALDEA: However, people answer the questions that
15 they're posed.

16 THE COURT: Yes.

17 MS. ALDEA: So when the prosecutor early on in the
18 investigation of the case with the information available to the
19 prosecution, which does not include information that is
20 available to the defense that we can get from our own client,
21 for instance, which prosecution is not entitled to, the
22 prosecutor is asking questions that are directed towards
23 certain events.

24 People have a tendency -- and, in fact, we all know
25 this to be true -- to answer only what they're asked and to not

1 give additional information. It happens all the time; happens
2 with witnesses on the stand, with police officers who say, I
3 didn't write that down, I didn't talk to him.

4 THE COURT: How many times have you said, objection,
5 that's beyond the scope of my question or nonresponsive to my
6 question?

7 MS. ALDEA: Sure.

8 THE COURT: I mean, come on. People answer questions
9 that go beyond the scope.

10 MS. ALDEA: It happens.

11 THE COURT: But in any event -- so the scenario
12 you're imagining is the Constitution entitles you to cross
13 examine the government's witnesses before the Capital Review
14 Committee does its job? And if that's the right, then why is
15 it limited just to something that might be *Brady* material? Why
16 wouldn't be it be -- well, the prosecutors don't really know
17 what questions to ask, so there may be all kinds of leads that
18 are being lost because we don't get access to the government's
19 witnesses, so we want access to the cooperators and other
20 eyewitnesses before the capital -- why? Why not?

21 MS. ALDEA: This isn't a fishing expedition, your
22 Honor. This is just -- and I'm not claiming that we're
23 entitled to one. There has to be material -- the information
24 that we're seeking has got to be material to guilt or
25 punishment.

1 With respect to the Capital Review Board's
2 determination. It's relevant to guilt. Now, factors that are
3 relevant to guilt include whether the defendant is punishable
4 as a principal, which is what we're dealing with here.

5 It includes whether he couldn't reasonably have
6 foreseen that his conduct in the course of the commission of a
7 murder would cause or create a grave risk of death.

8 And, again, I'm reading all of this from that same
9 case that basically said you're entitled to this information
10 prior to the decision of whether to seek to the death penalty.

11 THE COURT: But that doesn't entitle you to cross
12 examine the government's witnesses.

13 MS. ALDEA: It's not about cross examination, it's
14 about investigation.

15 THE COURT: But to cross examination by asking their
16 witnesses questions. You honestly think you have a right to
17 access to the government's witnesses at this stage of the case,
18 to ask them questions?

19 Is that who you think the Constitution entitles you
20 to?

21 MS. ALDEA: I do think that that is the case when --
22 well, again, I have to draw the distinction between what your
23 Honor is authorized to do and has the discretion to do and what
24 I'm absolutely entitled to.

25 THE COURT: But hang on. Let's get back. This is

1 about your client's *Brady* right.

2 MS. ALDEA: Correct.

3 THE COURT: I mean, discretion is not a license to do
4 something that's lawless.

5 MS. ALDEA: Well, correct. No, your Honor.

6 THE COURT: Okay.

7 MS. ALDEA: So the *Brady* right deals with the fact
8 that this is -- to separate it out. If it is material to guilt
9 or punishment, and if it is exculpatory, then there is a right
10 to it under *Brady*. The question of whether I am entitled to it
11 now, at this stage, prior to the decision of whether to seek
12 the death penalty is a question of discretion.

13 In other words, there is no -- *Brady* material, as the
14 government has pointed out in their papers, it's the bulk of
15 their submission, is not going to constitute a violation unless
16 there's prejudice.

17 So, in other words, to rise to the level of a due
18 process violation, which is separate from the issue of whether
19 it is exculpatory, whether it has bearing on guilt or innocence
20 or has exculpatory information, the government has pointed
21 out -- and I agree with them -- that it doesn't rise to the
22 level of a constitutional *Brady* violation and, therefore, not a
23 constitutional *Brady* obligation, if it's ultimately not going
24 to violate due process. But that's why I keep drawing this
25 distinction.

1 That's why all these of cases that have held that, in
2 fact, this information should be disclosed prior to the
3 decision of whether to seek the death penalty --

4 THE COURT: No, no, no. This information is where I
5 think you're over -- you're generalizing. Because the
6 information, the information is your client wasn't there when
7 these three individuals was shot. You know that. They've told
8 you that.

9 The idea that you're going to somehow enlighten them,
10 because they know the basis for that statement; right?
11 Whatever it is, they know the basis for it.

12 So you're just basically asking to have access to
13 their witnesses to tell them what they already know and so --

14 MS. ALDEA: Your Honor.

15 THE COURT: Let me back up for another second.

16 We've glided past the uniquely in the possession of
17 the government. The information that you're saying is *Brady* is
18 where your client was when these three individuals were shot.
19 Okay? Right? He wasn't there.

20 MS. ALDEA: Correct.

21 THE COURT: So that's not uniquely in the possession
22 of the government, because your client knows where he was when
23 these individuals were shot.

24 So I don't understand how the government is uniquely
25 in possession of information about where your client was when

1 he knows where he was and you can ask him.

2 MS. ALDEA: Right. But that's not what we're arguing
3 about, because that's the *Brady* information they've already
4 disclosed to us.

5 So what this argument is about, so they've already
6 said, under our *Brady* obligations, we told you he wasn't here.

7 THE COURT: Right.

8 MS. ALDEA: What we're saying is *that Brady*
9 encompasses more than what you've already gives us. *Brady*
10 encompasses the context so that we can actually conduct an
11 investigation and meaningfully use that statement.

12 THE COURT: If you want to know -- hang on. The key
13 fact is he wasn't there. That's the key fact. And wherever he
14 was, whatever he was doing, whatever he counsel, commanded or
15 advised or didn't -- let me read you a quote from the Second
16 Circuit case, because that's the one I listen to.

17 *US versus Diaz*, and it says, Araya, A-R-A-Y-A,
18 testified at trial that Diaz was not in her apartment during
19 the May 16, 1989, transaction with Mario. *Diaz* did not learn
20 that she would so testify until the trial and contends that the
21 nondisclosure of this fact by the government breached its
22 obligations under *Brady* to inform him of Araya's planned
23 testimony sooner and that he was thus entitled to a mistrial.
24 His argument is frivolous. First, there was no improper
25 suppression within the meaning of *Brady* when the facts are

1 already known by the defendant.

2 I don't understand what fact you don't know. The
3 fact that you might want to do investigative leads with this
4 fact, that's fine, have at it; but the fact that your client
5 wasn't there is something he knows about, and the fact that --
6 let's assume it's a government cooperator, or a government
7 eyewitness, not a cooperator, who is going to testify as Araya
8 did in this case, Second Circuit says it's not a *Brady*
9 violation, because it's not information that's uniquely in the
10 government's possession.

11 MS. ALDEA: Except the Second Circuit in *Leka* said
12 that even though the information was in the possession of the
13 defense attorney prior to trial, nonetheless, the absence of
14 the context and the absence of the witness' name in that case,
15 wound up constituting a *Brady* violation, because it's fact
16 specific, because you always have to put it in the context of
17 what it is that ultimately the defendant is deprived of.

18 THE COURT: No, you don't. This is a fact that is
19 uniquely known to your client.

20 MS. ALDEA: But it's not that fact that we're arguing
21 about. That's, I guess, the problem. The people -- the
22 people. I'm sorry, the government -- has already said that
23 they have an obligation under *Brady* to tell us that fact.
24 Okay?

25 What they've given us is a fact we already knew. We

1 already knew that he wasn't there during the murders; right?
2 So that's what they have disclosed to us.

3 THE COURT: So I don't know what we're arguing over.

4 MS. ALDEA: What we're arguing about is the
5 information -- so he wasn't there, so as a result, he doesn't
6 know what happened during his absence. He doesn't know what
7 happened when the witnesses were shot.

8 THE COURT: You're not entitled to a preview of the
9 government's case, and if there's anything else that's
10 exculpatory about his absence, the government has to tell you
11 that.

12 MS. ALDEA: But the people who were there, and the
13 people who know that he was not present, the people who know
14 that he didn't participate in the shooting, the identity of
15 those people who gave that information to the government, those
16 are the people we can speak to in the exercise of our ethical
17 obligation to investigate the case. The obligation of --

18 THE COURT: In other words, you are entitled to
19 access to the government's witnesses, even at this stage of the
20 case. Because, by that theory, you should be allowed to
21 explore every lead that could be helpful to your client.

22 MS. ALDEA: Well, your Honor, we need to at least
23 know the statements that were made.

24 THE COURT: Why?

25 MS. ALDEA: Because, if we don't know the statements,

1 then we're lacking the context to be able to --

2 THE COURT: The context of your client wasn't there?

3 MS. ALDEA: To be able to use that information in a
4 way that will benefit, first, the question of whether the death
5 penalty should be sought, and second, the question ultimately
6 of his guilt.

7 THE COURT: Okay.

8 MS. ALDEA: And finally the question of punishment --

9 THE COURT: Anything else?

10 MS. ALDEA: -- later on.

11 Can I just have a minute?

12 THE COURT: Of course.

13 MS. ALDEA: Thank you.

14 So, your Honor, I guess Mr. Barket crystallized what
15 I was trying to say on this point.

16 THE COURT: Okay.

17 MS. ALDEA: And so it's a little bit repetitive what
18 I said, but it crystallizes it.

19 The difference is this. As I said before, what the
20 government doesn't know when its interviewing these witnesses,
21 but the defense does know if it had access to the information.
22 We have access to what our client knows. We have access --
23 we're looking at it, I think the paraphrase was a single-minded
24 devotion of the defense attorney who is looking to exculpate
25 the client.

1 THE COURT: Of course.

2 MS. ALDEA: Who is looking to investigate every lead.

3 THE COURT: Sure. Of course.

4 MS. ALDEA: The government is not looking at it from
5 that perspective, and that's not to fault the prosecutors or
6 claim that they're not looking for the truth, but it's a
7 different perspective.

8 When we make a submission to the Department of
9 Justice, arguably, the prosecutor knows all of the information
10 that we're providing in mitigation most of the time anyway.
11 The difference is that our ability to put together the facts,
12 the disparate facts that they may have, with information that
13 we have, can make that disclosure more compelling. And that's
14 precisely why the court in 2006, the District Court in *United*
15 *States versus Delatorre*, did, in fact, order the government to
16 make these disclosures prior to the Department of Justice
17 submission in this case, particularly because the defendants do
18 have the right, and not only the right, but also has the
19 ability, the unique ability, to argue against the death
20 penalty.

21 Now, the cases that have so held, and there really
22 are a lot of them, and I'll provide the cases, if your Honor
23 would like, all of them with all of the citations post argument
24 to both the prosecution and to your Honor, but the cases, it's
25 *United States versus Delatorre*, it's you *United States versus*

1 *Feliciano.*

2 THE COURT: *Delatorre*. I'm sorry. If you could give
3 me the site of *Delatorre*.

4 MS. ALDEA: Correct. *Delatorre* is 438 F.Supp. 2d
5 892.

6 THE COURT: Okay.

7 MS. ALDEA: *United States versus Jackson* was the
8 Southern District case, which is 2003 WL 22023972, and that is
9 the one that, in that case, there are multiple other cases
10 cited, which I won't give to your Honor. There's *United States*
11 *versus Diaz*, 2005, WL 1575191. That's a 2005 case that says
12 that exigencies of capital litigation compel prompt disclosure
13 of information that will affect choice of penalty; *United*
14 *States versus Feliciano*, is another one, 998 F.Supp. 166,
15 granting a preauthorization request for mitigating evidence and
16 aggravating factors the government intends to prove. And there
17 are multiple cases actually cited within each of these cases,
18 which is why I say there are dozens.

19 So the proposition, the government put in its
20 submission that, in fact, the quote was that a request for
21 *Brady* material for this purpose has no legal basis and they
22 cited two cases from 1996, two district court cases, that are
23 not even directly on point. There's ample authority for the
24 proposition that the district court not only has the authority
25 to issue this disclosure, but that this is particularly

1 compelling in a capital case. Obviously, I mean, that's what
2 we're dealing with. But also that this is a requirement under
3 heightened due process, under the correct circumstances.

4 So it's all about the circumstances. So the only
5 other thing I would add to all of this --

6 THE COURT: Yes.

7 MS. ALDEA: -- is on the third point, which has to do
8 whether the disclosure should be now or later, just in terms of
9 what I understand. We're not actually arguing about that much
10 substantively here, I think, because the government has, in
11 fact, said, look, we're going to provide you all this
12 information. We're going to tell you who the witnesses are who
13 made these statements. Assuming that there are statements. As
14 your Honor said, I don't know that, but assuming that there are
15 statements.

16 We're going to give you the specific statements, but
17 we're going to do it on a schedule, on a closer schedule right
18 before trial. So there isn't a question as to whether or not
19 we're going to get the information. The question is when we
20 get the information. That's what all of this is really about.

21 THE COURT: That's always true.

22 MS. ALDEA: Correct.

23 THE COURT: But then what you're saying is the *Brady*
24 right now gets conformed into a discovery right where you get
25 the prosecution's files.

1 MS. ALDEA: No, your Honor.

2 THE COURT: Yes, it absolutely is. Because -- or at
3 least the key parts of their file. You want access, again, on
4 the assumption that this information comes, even exclusively
5 from cooperators, and it doesn't, then you get access to them.
6 You get access to them right after the case is indicted,
7 because the sooner the better; especially if the capital review
8 process, obviously, is at the front end of the life of the
9 case.

10 MS. ALDEA: Well, your Honor, we don't get access to
11 the entire file. That's for sure. The only portions of the
12 file that we would get access to is the information that is
13 exculpatory and the context of that information. In other
14 words, the person who made the declaration and the specific
15 statement, rather than the Government's paraphrasing of it.
16 That's our argument. So it's not that we have open file, we
17 get access to everything that was said.

18 THE COURT: You get access to the crown jewels. If
19 you got a choice, you'd say -- you can have the cooperators or
20 you can have the telephone logs. I'll take the cooperator, and
21 500.

22 MS. ALDEA: Well, okay, but I get the crown jewels.
23 I mean, I guess that in this capital defense the crown jewels
24 to us are what's exculpatory. That's what we're interested in.

25 THE COURT: No, no, no, no. See, but you have what's

1 exculpatory. You have what's exculpatory. What you want to
2 know is whether you or not you can fish out more that's
3 exculpatory, because you have the essential fact. And beyond
4 that, you have the number one source of where your client was
5 when these murders took place; your client. So you have that.
6 And you can pursue any lead you want with that.

7 What you want to know is why the government still
8 thinks he's guilty. And you don't get that. You don't get
9 that under *Brady*. You don't get it under due process and you
10 sure as heck don't get it under my discretion. There's no case
11 law that supports that notion.

12 MS. ALDEA: We don't want to know why they think that
13 he's guilty.

14 THE COURT: Yes, you do. Yes, you do. You want to
15 know what the theory is as to why they still think he's guilty
16 and he still should be eligible for the death penalty, so you
17 can poke holes in those theories.

18 But what you don't get to do is try the case several
19 times. You don't have a single case, not a single case, that
20 says there's a *Brady* right to access to a government cooperator
21 or government eyewitnesses who otherwise have provided
22 information that the government's provided to you in terms of
23 the key exculpatory fact. Again, assuming any of this is
24 exculpatory. Because it's not if the government's theory is
25 that he wasn't there.

1 You are saying, well, there might be other things the
2 government hasn't thought of because they're wearing the
3 prosecution hat and not the defense hat. That's true of every
4 single criminal case. And the *Brady* right is not elastic
5 enough to say, we don't trust prosecutors to the point where we
6 think the prosecutors have to turn over their cooperators to
7 the defense, or their other witnesses to let them have a go at
8 it. There's no law for that.

9 MS. ALDEA: That is true, your Honor, however, what
10 is not true is that there's no case that says that in this
11 context we're entitled to the material. There are cases that
12 say that. *Leka* is a case where --

13 THE COURT: *Leka* is a case involving inconsistent
14 eyewitness testimony. That's not this case. There's nothing
15 in the record of this case, including the material I reviewed,
16 that remotely suggests that there's any inconsistency.

17 So you keep relying on *Leka* and *Leka* is not this
18 case. And *Diaz* says what it says about what's exculpatory,
19 when information is in the possession of the defendant about
20 where the defendant was and an argument that the government's
21 fair to tell about what its witness is going to say about where
22 the defendant was was frivolous. That was when the person
23 testified at trial in a way that revealed the defendant's
24 absence from a key drug deal. *Diaz* is still good law.

25 MS. ALDEA: Well, *Zambrana* was a case that actually

1 was that as well with respect to a witness that actually wound
2 up giving information that showed that even though the
3 defendant was involved, which was the government's theory of
4 the case, nonetheless, the defendant wasn't directly -- didn't
5 participate in an individual transaction.

6 THE COURT: Yeah.

7 MS. ALDEA: And the court found that that was
8 exculpatory and that that constituted *Brady* material as well.

9 THE COURT: And if that had been this case, then the
10 fact that he wasn't there was a fact -- the equivalent fact in
11 the case you've been told. So that's the problem is that the
12 information to which you are entitled, you've been given.

13 What you want is to try to do more with that
14 information, and you can do what you need to do with that
15 information. That doesn't mean you get access to the sources.

16 By the way, assuming you don't have access to the
17 sources are ready, you don't get to then say, we'd like to talk
18 to the eyewitnesses who are the source of that.

19 Because, by the way, if the source of the basis for
20 this disclosure was what's already in the discovery, then
21 there's your leads.

22 MS. ALDEA: Well, except in *United States versus Gil*,
23 the court found that, if there is exculpatory information that
24 has been provided to the defense and it's buried within a
25 packet of discovery and not highlighted, then that does not

1 provide the defense meaningful opportunity --

2 THE COURT: Right. But let's be honest. It's not
3 hard to figure out which, among these categories of discovery,
4 you have been given where you might find information that tells
5 you what you already know from your own client. Okay?

6 MS. ALDEA: That part I have to defer to co-counsel
7 on, because that goes to the factual review. My involvement in
8 the case so far has been limited to this issue --

9 THE COURT: Yes.

10 MS. ALDEA: -- so I could defer to Mr. Barket on the
11 question of what we can glean and what we can't.

12 THE COURT: Of course.

13 MS. ALDEA: But the reason that I keep going back to
14 *Leka* is not for the proposition of what the information was in
15 that case. I go back to it for the proposition that even when
16 the defense has a particular source, a particular piece of
17 information, part of the analysis in *Leka*, and part of the
18 prosecution's argument, was that the defense, in fact, already
19 had all the information available to it before trial started.
20 But the Second Circuit said, yeah, and you know it's nice to
21 fault counsel for the fact they didn't use it most efficiently
22 at the time that we were on the eve of trial and there were 23
23 days left till the defense case, but the timing of when that
24 was given under the circumstances of that case rendered it
25 unusable.

1 THE COURT: But if the exculpatory information in
2 *Leka* that was revealed by this off-duty cop, the equivalent in
3 this case you have been provided that information.

4 MS. ALDEA: Perhaps --

5 THE COURT: So if the off-duty cop said to Ms. Comey
6 what the person was revealed to have said nine days before the
7 trial, Ms. Comey has revealed that information now. So *Leka*
8 doesn't say that somehow if this had been provided in the early
9 stages of the case, it still would have been a *Brady* violation.
10 *Leka* says it didn't give the defense enough time to make use of
11 it so close to trial.

12 We don't even have a trial date yet. So the *Leka*
13 equivalent of *Brady* material in this case has been disclosed.

14 MS. ALDEA: Well, actually, not. So the defense had
15 the information that the witness can't testify at trial, which
16 is what is equivalent here. What was missing in *Leka* was the
17 witness' name in a timely way.

18 THE COURT: No, what was missing was the fact that
19 the testimony was inconsistent about the fact that it could not
20 have happened, right, because he saw it from the second floor,
21 and that was inconsistent with the other two witnesses. That
22 is what was exculpatory.

23 The equivalent information in this case you have been
24 provided. So *Leka* doesn't help you here. It just doesn't.

25 *Leka* doesn't say that the prosecution was required to

1 give over what you're saying you're entitled to here. *Leka*
2 says that the prosecution was required at an earlier stage of
3 the case to reveal the exculpatory information.

4 MS. ALDEA: *Leka* says more broadly, just in general,
5 that you look under the specific circumstances of the case to
6 determine whether the information that the defense is afforded
7 is sufficient to allow the defense to meaningfully use it. So
8 we cannot meaningfully use the statement, which, by the way, we
9 already knew that he wasn't present.

10 What we can meaningfully use, as part of our duty to
11 investigate the case and to provide compelling arguments to the
12 prosecution in favor of mitigation, or in favor of -- well, to
13 the government it would be in favor of mitigation. What we
14 don't have is the context and what we don't have is the
15 identity of the people who made the declarations. And that, I
16 would argue, under these specific -- under this specific case,
17 the circumstances here is what we need to make the disclosure
18 meaningful. It is an exculpatory disclosure. That's why the
19 people turned it over.

20 So when we argue about the fact that it's not
21 exculpatory at all because it's part of their theory of the
22 case, that's belied by the disclosure. The question now is is
23 the content of the disclosure --

24 THE COURT: That's not true. We tell prosecutors,
25 even if you don't think it's *Brady*, if you think someone could

1 regard it as *Brady*, you make sure to turn it over.

2 MS. ALDEA: Sure.

3 THE COURT: And we want them to do for obvious
4 reasons.

5 MS. ALDEA: Sure.

6 THE COURT: But to the extent that the government's
7 theory, as you say, has evolved of the case, what might have
8 appeared to be *Brady* back in May, may not be *Brady* now going
9 forward. I don't know. But the bottom line is that, whatever
10 you think is exculpatory, and we are going round and round,
11 they provided it, you want more, and the question is, what's
12 the basis to that entitlement? I get it. I understand the
13 point.

14 MS. ALDEA: All right. Thank you, your Honor.

15 But can Mr. Barket just address the second portion of
16 your Honor's --

17 THE COURT: Of course. Yes.

18 MR. BARKET: There's been a good deal of discussion.
19 I forgot the precise question that your Honor asked where
20 Ms. Aldea looked at me.

21 THE COURT: This whole thing is based on the
22 assumption that the basis for the government's disclosure comes
23 from witness information.

24 MR. BARKET: Well, it comes from something; right?

25 THE COURT: It comes from something.

1 MR. BARKET: We started off with a factual basis for
2 our conclusion that Nick wasn't present when these people were
3 shot, because that's been Nick's position from the moment he
4 was arrested.

5 THE COURT: Yes.

6 MR. BARKET: Our factual basis for it is Nick. Their
7 factual basis, I presume, is not the defendant said he wasn't
8 there. I presume their factual basis is something else.

9 THE COURT: Yes.

10 MR. BARKET: And the factual basis is what we're
11 after. The conclusions, we agree upon.

12 THE COURT: Yes.

13 MR. BARKET: Just in the simple example, if there is
14 an alibi in this case -- I'm not sure that there is or there
15 isn't, but suppose Nick had an alibi and said I was someplace
16 else at the time of the crime, and he didn't know that there
17 was an unknown witness to him that was present as well. Well,
18 that unknown witness would certainly be exculpatory and *Brady*
19 would have to be disclosed, because it would be a much more
20 powerful presentation to a jury, to a fact finder to a
21 decision-maker, that not only does the defendant say he wasn't
22 present, but also another objective third-party witness does.

23 So when we get to the point where we're arguing that
24 Nick is not responsible for the crimes here at all --

25 THE COURT: Yes.

1 MR. BARKET: -- we don't want to rely just on what
2 Nick says, as much as we may subjectively believe him, we want
3 the underlying facts that the government has to come to the
4 same conclusion. That's what we'd want to be able to put
5 before the jury or a decision-maker beforehand. We want to be
6 able to say, here are the facts that happened.

7 So when your Honor says we have the information
8 already, what you're saying is we have the conclusion already.
9 We don't have the information.

10 The conclusion we've had from the beginning. The
11 facts, the underlying sources of that conclusion, is what we're
12 the striving to obtain.

13 And would I like a preview of the case? I mean, you
14 don't know me well, but you know me a little bit, yeah, I'd
15 like it all.

16 THE COURT: Everybody in your position would want --

17 MR. BARKET: Of course, but that, legally, we know
18 we're not entitled to.

19 What we think we're legally entitled to is the
20 exculpatory part of that crown jewels, the part where -- so
21 powerful, that it led the government to conclude the same thing
22 that our client told us on December whatever the date of his
23 arrest. And if you think about how powerful that is, right, he
24 was arrested that day. It was a horrible view of the case on
25 the day of his arraignment and in the months that followed.

1 It's now evolved where the government has come
2 towards our conclusion. We want to know what those underlying
3 facts are: How did that happen? Why did that happen? What
4 are the sources of that?

5 And that is *Brady* material. That's exculpatory. And
6 that we need not only for the trial, but also to make an
7 argument to the Department of Justice.

8 When your Honor says that, well, they know what they
9 know, so how are you going to possibly enlighten them, and I
10 know you don't mean to do this, but it diminishes the defense
11 attorney to be meaningless.

12 THE COURT: No, no, no, no.

13 MR. BARKET: We become potted plants.

14 THE COURT: What I was saying was that they know that
15 your client wasn't there and they know why they know that he
16 wasn't there. What you want is to know why -- how it is that
17 they know so you can tell them what they already know.

18 MR. BARKET: No, so we can take that information that
19 they uniquely have, couple it with information we have, and
20 make a persuasive case to them. That's our role.

21 THE COURT: But all you're going to persuade them of
22 is that he wasn't there.

23 MR. BARKET: No, no, no, Judge.

24 THE COURT: Whatever else it is that you think you
25 can persuade them with, you have the information. You need to

1 go then if there's other leads you want to follow, then you
2 follow it.

3 You don't have a single case in the history of
4 American jurisprudence that says that you're entitled to have
5 access to any eyewitnesses who are the basis of this
6 information. None.

7 MR. BARKET: Well, your Honor, I would respectfully
8 disagree with. The cases that we cite saying that the
9 prosecution or the government has to provide a specificity,
10 facts of the underlying conclusion, are what we're relying
11 upon. And that's the crux of the argument. We all agree that
12 the conclusion was disclosed. We have it. They now come to
13 it.

14 THE COURT: This isn't a conclusion, Mr. Barket. A
15 conclusion is so you say here are the facts, therefore, act.
16 This is a fact; your client wasn't there.

17 MR. BARKET: Well --

18 THE COURT: Hang on. Please don't interrupt.

19 MR. BARKET: I'm sorry.

20 THE COURT: Your client wasn't there when these three
21 individuals were shot. That's a fact. That's not a
22 conclusion.

23 MR. BARKET: It is a fact because witnesses'
24 information led them to that fact, to a conclusion. It becomes
25 a fact based upon --

1 THE COURT: The conclusion is, is he guilty or not?
2 You're saying that may lead to the conclusion he's not guilty.
3 Fair enough. But the fact that he wasn't there, you have been
4 told by the government.

5 MR. BARKET: We don't -- we are not being given the
6 underlying basis for that.

7 THE COURT: You're not entitled to that. There's
8 no -- I don't understand -- I still -- we've been at this for
9 an hour plus, and I still don't understand how you think you
10 have a *Brady* right to know the basis of what the government has
11 told you by way of information. Because, why, because you
12 think you can cross examine their cooperators or their
13 eyewitnesses better, because when they asked them questions,
14 they only answer the questions they were asked, and you can ask
15 better questions that will lead to enlightenment.

16 MR. BARKET: No. I mean, your Honor, with all due
17 respect, that's not our position. Our position is that we are
18 entitled to the specificity, which is the underlying basis of
19 what you described as a fact, what I describe as a conclusion,
20 and we cited cases to that effect.

21 THE COURT: Actually, no, you cited -- you quoted
22 some today. You didn't cite to me in your letters.

23 MR. BARKET: Oh, I think we --

24 THE COURT: You cited some. I read those, but
25 they're not binding and they're not helpful, to be honest with

1 you.

2 MR. BARKET: Well, to the extent that they're not
3 helpful, I mean, kind of --

4 THE COURT: They're not helpful because they don't
5 describe the facts and circumstances in this case. That's why
6 they're not helpful, with all due respect.

7 MR. BARKET: But then they can't describe the facts
8 and circumstances of this case.

9 THE COURT: And that's why they're not helpful.

10 MR. BARKET: But the specificity, the point is that
11 you can't simply say and fulfill your *Brady* obligations by
12 saying your client wasn't there and not disclose, in our view,
13 and not disclose the underlying basis for that. And it is a
14 conclusion. It's a conclusion based upon a series of facts.

15 THE COURT: No. It's a fact. It's a fact.

16 If somebody says Mr. Barket was in this courtroom at
17 this time, that's a fact. If someone says Mr. Rico was not in
18 the courtroom at this time, that's a fact. Those aren't
19 conclusions.

20 MR. BARKET: Right. But those facts are made up of
21 witnesses and records --

22 THE COURT: Or other information.

23 MR. BARKET: Or other information.

24 THE COURT: Right. So they are still facts.

25 MR. BARKET: To which we're entitled.

1 THE COURT: You have that fact --

2 MR. BARKET: We don't.

3 THE COURT: -- that he wasn't there. You have the
4 fact he wasn't there when the three individuals were shot.
5 What you don't have is basis for that.

6 MR. BARKET: Fine.

7 THE COURT: Okay?

8 MR. BARKET: Right.

9 THE COURT: And once again, we're going round and
10 round, but okay.

11 Anything else?

12 MR. BARKET: No.

13 MS. ALDEA: But your Honor one last --

14 THE COURT: Sure.

15 MS. ALDEA: Just the cases.

16 THE COURT: Yes.

17 MS. ALDEA: These aren't cases I cited to you today,
18 these are from the submissions. So this is actually from the
19 submission.

20 Your Honor says there's no case that would require
21 actually turning over the witness statements, the substance of
22 the statements themselves, rather than just the information and
23 the identity. And so reading from the submission in this case,
24 this is from the October 24th reply at the bottom of page 4, it
25 begins: *United States versus Taylor* was a case, an Eastern

1 District case from 2014, that talked about pursuant to *Coppa*,
2 district courts have uniformly recognized the discretion to
3 order *Brady* disclosure at any time as a matter of sound
4 management.

5 The cases that follow answer directly your Honor's
6 question. So the first one, *United States versus Jacobs*, which
7 is a Connecticut case from 2009, ordered immediate disclosure
8 of co-conspirator statements in a drug prosecution and held
9 that the prosecutor statements that these relevant statements
10 would be disclosed in accordance with the Jencks Act was
11 inadequate. The prosecutor intended to call the
12 co-conspirators as a witness during trial. The duty to
13 disclose under *Brady* trumped the duties under the Jencks Act.

14 Similarly, *United States versus Lino*, that's a
15 Southern District case from 2001, directed the government to
16 produce the defendants immediately any written or oral
17 statement, including statements recorded in investigative
18 meeting notes by any witness the government anticipates calling
19 in its case in chief, et cetera. And you can read the rest.

20 THE COURT: Right. And so the problem you have with
21 those cases is, I agree with those cases, and my individual
22 trial practices, the government doesn't turn over its Jencks
23 material pursuant to Jencks.

24 MS. ALDEA: Correct.

25 THE COURT: I've never followed that.

1 So, in other words, after the direct testimony of
2 their witnesses. Not only that, I don't let the government
3 wait until the Friday before the witness testifies to turn over
4 this material. They turn it over sometimes weeks or months in
5 advance in this courtroom. All right. So you're going to get
6 disclosure of this information in a far more meaningful way
7 than Jencks would ever otherwise give you. But those cases
8 don't support the notion here, that after being provided with
9 the exculpatory information -- these are also generic orders
10 where you have to make sure you provide exculpatory information
11 and otherwise provide the witness statements in advance before
12 Jencks would require the government to do that. All that's
13 going to happen here.

14 So I don't know see how these cases support the
15 notion that you should get access to the witness statements or
16 the witnesses themselves, especially if there are security
17 issues with these witnesses. I don't know.

18 MS. ALDEA: Correct, your Honor.

19 THE COURT: But if there are, there's plenty of case
20 law that says that they get to rely on that to not give you
21 access to who the witnesses are. It may be that the content of
22 the witness' statements themselves will reveal who they are.

23 MS. ALDEA: Well, your Honor, I absolutely agree with
24 that proposition 100 percent; however, the government has not
25 argued that there's any reason to not provide disclosure at

1 this time, or because of witness safety or other concerns.

2 That's simply not an application that was made here.

3 If that application is made, and your Honor credits
4 that application, no question, and all of these cases so hold,
5 but these cases *Lino*, *Gatto*, these other cases, *Jacobs*, they're
6 not just general orders, they are cases that actually compelled
7 immediate disclosure. Immediate disclosure upon the request
8 being made well before trial, well before even -- I'm not sure
9 whether it was in the context of before the decision to seek
10 the death penalty was imposed in these cases, which is why I
11 cited the new cases.

12 THE COURT: Yeah, I don't remember that either.

13 MS. ALDEA: That I don't. But these are cases that
14 immediately talk about immediate disclosure. And, in fact, in
15 *Coppa* itself, which is interesting. *Coppa* was a Second Circuit
16 case that actually reversed a decision by a Southern District
17 Judge, I believe, who ordered immediate disclosure of all
18 exculpatory materials well, well in advance, of trial, well
19 before even what your Honor would set as the schedule pursuant
20 to Jencks. Said, as soon as the request is made, you need to
21 turn it over. So well before trial.

22 And when the Second Circuit wound up finding that the
23 judge had exceeded his authority, the Second Circuit said,
24 look, we're not holding, we're not saying that the judge is
25 unauthorized to order disclosure of what it deems to be

1 exculpatory *Brady* material at that stage. The court has that
2 authority. The court retains that authority. But he went too
3 far because he said all material and didn't take into account
4 materiality at all.

5 So the Second Circuit in *Coppa* said that it's a very
6 fact-specific inquiry and you need to look for the purposes of
7 the timing of the disclosure, and whether disclosure very close
8 to trial is sufficient, or whether disclosure, you know, even a
9 month or two before trial is sufficient. You have to look at
10 the circumstances, which is why I say that under that
11 reasoning, in our case, we have very different facts here.

12 We have witnesses who are going to disappear. We
13 have witnesses who are transients. We have witnesses who are
14 potential sources for the government's information here for
15 these statements for this exculpatory material. If we find
16 out, even pursuant to your Honor's generous schedule, three
17 months or four months or six months before trial, it may be too
18 late for us to conduct a meaningful investigation, because we
19 may no longer be able to locate these witnesses out of the
20 country. That's the problem that we're facing here.

21 THE COURT: What's to stop you from talking to these
22 individuals now as part of your investigation?

23 MS. ALDEA: My understanding is we don't know who
24 they are.

25 THE COURT: So I just want to be clear on something.

1 There are individuals that you know about their
2 status but you don't know who they are. And these are people
3 you think are going to testify at trial.

4 MS. ALDEA: Correct, your Honor.

5 THE COURT: So, if they're going to testify at trial,
6 what's the problem?

7 MS. ALDEA: Well, the fact that the government
8 currently has a present intention for them to testify at trial,
9 doesn't mean that they will, and I don't know that all the
10 witnesses that we're talking about are witnesses that the
11 government intends to call. I don't know, as I said --
12 remember my hand tied behind my back.

13 THE COURT: Yes.

14 MS. ALDEA: I don't know the source or the content of
15 the actual information. All I have is that summary statement,
16 and so just -- in some ways, I mean, it's interesting because
17 my inability to meaningfully articulate why the information is
18 exculpatory, is caused by the lack of information that I've
19 been given. I don't even have enough context to articulate
20 that.

21 Now, your Honor may be right, maybe it's because it's
22 lacking. Maybe it's because every other statement that the
23 government has is information that is purely inculpatory. I
24 doubt that that's the case. I doubt it only because I think
25 the context will allow us to be able to meaningfully use the

1 one bit of exculpatory information that we have. But I don't
2 know.

3 So all I can do is provide this background to allow
4 your Honor when you review the material in camera to make the
5 determination of whether disclosure -- again, we're not arguing
6 about whether it will be disclosed. We all agree that it will
7 be. We all agree that we're going to get it. The question is
8 will it be meaningful if we get it just before trial? And by
9 just before trial, I mean pursuant to the schedule your Honor
10 will set.

11 THE COURT: Okay.

12 MS. ALDEA: The last point on that is in *Coppa* itself
13 which is the people's best case, the one where there was a
14 reversal by the Second Circuit, the people -- I keep saying the
15 "people," I'm sorry.

16 THE COURT: No, I know what you mean.

17 MS. ALDEA: You know I'm a state prosecutor, I have
18 given myself away.

19 THE COURT: I totally get it.

20 MS. ALDEA: So the people, the prosecution in *Coppa*
21 actually turned over the very content, the very witness
22 statements that they're arguing about now in this case. The
23 same type. So it wasn't a question of not disclosing those
24 witness statements. It was a question of not disclosing purely
25 impeaching material that was the fight in *Coppa*.

1 THE COURT: Right. Right. Thank you very much.

2 MS. ALDEA: Thank you, your Honor.

3 THE COURT: Ms. Comey.

4 MS. COMEY: Thank you, your Honor.

5 Starting with the issue of DOJ's internal process.

6 THE COURT: Yes.

7 MS. COMEY: I'm pretty sure there's a consensus here,
8 I hope, that the administrative process within the Department
9 of Justice, whereby that department decides how to exercise its
10 prosecutorial discretion, does not give a defendant any rights,
11 any rights to have any commentary on that decision, or make any
12 submissions to the Department of Justice as it makes that
13 decision.

14 What the defense is saying is that your Honor should,
15 in your discretion, order us to turn over what they argue as
16 *Brady* material. So what this really goes to is -- what they
17 are really asking you to decide is whether or not this
18 information, the details behind the Government's current
19 position that Mr. Tartaglione was not present during the final
20 three murders, constitutes *Brady* material. And as we've set
21 forth in our papers, it simply is not.

22 The defense now has the government's theory of the
23 case that he was not present during those final three murders,
24 but was nevertheless culpable on aiding and abetting felony
25 murder or Pinkerton theory.

1 And for the record, aiding and abetting language was
2 in the original charging document, and those three theories
3 have mentioned to defense counsel during all of our meetings.
4 So this should not be coming as a surprise that those theories
5 have always been possibilities.

6 What the defense is asking for, essentially, is extra
7 details that support the government's case and that the
8 government is going to be using at trial in its affirmative
9 case in chief to prove the defendant's guilt.

10 THE COURT: What if the statements that are -- let's
11 say you get some witnesses who give you a series of statements,
12 and one of the statements is that Mr. Tartaglione wasn't there
13 when these three individuals were shot but provides information
14 that to you seems maybe neutral at worst, or inculpatory, but
15 could actually be exculpatory in ways that you can't even
16 imagine. I mean, I think that's the point, is that all they
17 want is the statements to see whether or not there's something
18 in there that they can mine to not only present mitigating
19 factors to the Justice Department but also prepare the defense.

20 MS. COMEY: Well, with respect to the mitigating
21 factors, those statements we already have. We can already look
22 at them and we can already evaluate them ourselves.

23 THE COURT: Assuming that you can interpret those
24 statements as mitigating factors; right? Because it may be
25 that, as much as you try to keep an open mind about what could

1 be *Brady* and exculpatory or mitigating, you're not in a
2 position, you don't have the knowledge that counsel for
3 Mr. Tartaglione have where they are doing their own
4 investigation and they can see a statement and see its value in
5 a way that only they can do.

6 So I don't think that's -- that's not a controversial
7 point. Of course they're in a better position to know what
8 might be helpful to their client. No disrespect to you and the
9 folks at Justice, but that's their mission in life, is to look
10 for those facts that could be helpful to their client, they are
11 going to be more keen, they're going to be more creative, more
12 imaginative and just more capable of knowing what could be
13 useful to them.

14 MS. COMEY: So the problem with that, your Honor, is
15 that that leads to the slippery slope that I believe your Honor
16 was talking about while defense counsel was speaking. That is
17 theoretically possible with respect to virtually any witness
18 statement. It is theoretically possible with respect to
19 virtually any piece of evidence. That's why *Brady* has a
20 materiality requirement. That's why the question is whether
21 those statements are clearly material. So not only just
22 potentially exculpatory, maybe tend to help the defense in
23 defending the case, but are material, and so here any statement
24 that is not -- that would be required that much interpretation
25 and that would only be potentially helpful to the defense with

1 their particular view is not clearly material.

2 THE COURT: Right. So there's the *Brady* right and
3 then there's the *Brady* right applied to a potential capital
4 case. So it is sort of a *Brady* right on steroids. I mean,
5 because the death is different case law. It says what it says.
6 And so what counsel are saying is, look, we don't want to try
7 to make *Brady* so elastic that this is going to be the case in
8 every prosecution, but here we're talking about the potential
9 of the death penalty, and so maybe there should be, in the
10 exercise of a court's discretion, some accounting for that
11 phenomenon, that circumstance here.

12 What's wrong with viewing it through that lens?

13 MS. COMEY: Well, your Honor, I think that the way to
14 handle that would be what we've already done, which is
15 providing your Honor, in camera, the statements to look and to
16 see whether there is some sort of potential nugget in there
17 that we may have overlooked that an impartial fact-finder might
18 find.

19 THE COURT: So what I got, though, is a summary. I
20 didn't get -- if there are any statements, and these are
21 statements that are presumably recorded in reports, different
22 agencies have their different nomenclature for them, whatever,
23 302s or 7s, I forget what they're all called. That I don't
24 have. What I have is the government's summary of the basis for
25 the information that you provided to counsel for

1 Mr. Tartaglione.

2 MS. COMEY: Which include the detailing of any
3 specific witness statements that might also lead to the
4 conclusion, none of which suggest any sort of exculpation of
5 the defendant on the theories of aiding and abetting liability
6 or Pinkerton or felony murder theory.

7 Hypothetically, were the statements themselves to
8 involve something like the defendant left and he had no idea
9 that the other three victims were even in the bar, he never saw
10 them that day, that would be exculpatory, certainly something
11 to that degree. Something that added more detail or nuance to
12 what he saw, or didn't see, or something like that, that
13 perhaps went to the core of aiding and abetting or felony
14 murder or foreseeability. But that is not what these
15 statements are.

16 THE COURT: So to be clear, what you've done in the
17 submission for *in camera* review is provide the information,
18 including statements that related to Mr. Tartaglione's absence
19 when these three individuals were shot. And you recognize, of
20 course, I don't think there could be any dispute, that if the
21 other information, including statements, was that he had no
22 idea, or he was angry when he heard about how they were shot,
23 or something that's just clearly exculpatory, you would have
24 turned that over.

25 The issue for Mr. Tartaglione is that his lawyers

1 might be able to spot material information in what to you might
2 be ambiguous or neutral information. So we can agree that
3 where the light shines on the information that's clearly
4 inculpatory or exculpatory, your obligations are going to
5 follow from that. It's the gray area. And they're saying, if
6 they don't get the details, they can't mine the gray area.

7 MS. COMEY: Your Honor, again, that is true in
8 virtually every case, but that does not entitle the defense to
9 all witness statements regarding potential absence from a
10 scene. And playing out some scenarios in other kinds of cases
11 where the same request might be made also points to the problem
12 here.

13 I mean, you can imagine a murder-for-hire case, for
14 example, where the defendant hired the murderer and therefore
15 wasn't present. So any witness to that murder would very
16 clearly say, wasn't present. He wasn't there. He wasn't
17 around. Government agrees and tells the defendant, your guy
18 hired the murderer, wasn't present for it. That statement
19 alone does not entitle that defendant to every witness
20 statement about what happened at the murder so that they can
21 then go on a fishing expedition to figure out whether there would
22 be any sort of nugget that they might want to use. That is not
23 what *Brady* requires.

24 THE COURT: So isn't this a just question of timing?
25 I mean, to the extent that the information that you provided to

1 counsel is at least derived from witness statements, and these
2 are individuals who are going to testify at trial, you're going
3 to be turning over the reports of their interviews and their
4 statements anyways, whether it's pursuant to Jencks or because
5 of the court's discretion or due process clause anyway. So
6 it's just a question of timing.

7 So it's sort of like my grandmother used to say, why
8 put off till tomorrow what you can do today. If you're going
9 to have to give these things over eventually, what's the
10 downside to giving them over now?

11 MS. COMEY: So, your Honor, first of all, we're not
12 required to give them over earlier under Jencks, unless they
13 are *Brady*, and in terms of the timing and what the case law
14 says about the timing --

15 THE COURT: Well, you see the cases that counsel
16 cited, it says immediately; right? So immediately means now.

17 MS. COMEY: Yes, your Honor. But talking about, I
18 believe it's the *Gill* case particular, that talks about the
19 timing in order to have sufficient time opportunity to use the
20 information, the fact that defense counsel has known now months
21 and potentially more than just months in advance of a trial,
22 that the government's theory is that the defendant was not
23 present for these three murders, is more than enough to give
24 them the context they need, as soon as they receive those
25 statements, to then look for the critical pieces and use it.

1 And it's also more than enough for them to use the
2 Rule 16 discovery, which also supports this theory and to
3 target it as well. They know the specific timeframe when these
4 murders happened. They have been given specific pieces of Rule
5 16 discovery that support his absence. We have made ourselves
6 available to talk with defense counsel about those specific
7 pieces of discovery, and so they can already use that to build
8 their leads. And then, as soon as they get those statements,
9 in accordance with the schedule that your Honor normally sets,
10 they will be in a fine position to use any additional
11 information regarding the defendant's absence from those
12 murders.

13 THE COURT: But that's the timing point.

14 Let's just say, hypothetically, we set a trial date
15 for -- I don't mean to scare anybody, but let's say we set a
16 trial date for a year from now. As you know, as your office
17 knows, and I assume counsel know from talking to others, I make
18 the government provide its exhibits they're going to introduce
19 in the case in chief well in advance. We get *in limine*
20 motions. The 404(b) has got to be produced way in advance and
21 the 3500 material gets produced way in advance.

22 So let's say that I had a schedule that says if we're
23 going to start the trial on November 21 of 2018, the
24 government's got to turn over its Jencks material by
25 October 1st, 2018.

1 So it's just a question of whether counsel gets it
2 now or they get it October 1st of 2018. That's really what
3 this comes down to; right?

4 MS. COMEY: The question, though is, it comes down to
5 whether or not it's *Brady*, then there would be a reason to have
6 it --

7 THE COURT: Because Jencks would require you to turn
8 over the statements anyways, because certainly anything they
9 would say about Mr. Tartaglione's presence or absence will be
10 material to their testimony; right?

11 MS. COMEY: Well, your Honor, as your Honor pointed
12 out, Jencks doesn't actually require us to turn over those
13 statements until after a witness has testified on direct. We
14 do so earlier as a courtesy.

15 THE COURT: I do it even earlier than your courtesy.

16 MS. COMEY: Yes, your Honor. And we comply with
17 that.

18 THE COURT: Yes.

19 MS. COMEY: But earlier would -- what our position
20 is, the only justification for turning over witness statements
21 earlier, would be is if they contain *Brady*, and here they do
22 not. They are consistent with the government's theory. And,
23 in addition, even if they were somehow exculpatory, these extra
24 statements, to the extent there are any that say
25 Mr. Tartaglione was not present, are cumulative of the Rule 16

1 evidence that they've already received, as well as our
2 admission, our statement, that our theory of the case is that
3 he was not present.

4 THE COURT: Right. But getting back to my point
5 about the timing. If I did set a trial date for a year from
6 now, I would have, consistent with how I've done other cases in
7 the past, and assuming this was a capital case, I would be more
8 inclined to push the deadlines up. So you would be talking
9 about either providing the statements in the next week or so,
10 or in the next 11 months; 10 or 11 months. It's just timing.

11 And so I guess -- what's the downside to having it be
12 done now, as opposed to 10 or 11 months from now?

13 Is it just principle or is there something else that
14 gives you pause to say, no, we really don't want them to have
15 this statement?

16 MS. COMEY: Your Honor, one is principal, and one is
17 safety of the witness, of any witnesses, and any loved ones or
18 family members of them. This is a case that involves serious
19 violence. It includes the murder of three people purely
20 because they witnessed a crime. We are concerned about the
21 safety of our witnesses. And the closer to trial that counsel
22 receives this information, the better we are able to ensure
23 safety.

24 THE COURT: Okay. Other points you want to address.

25 MS. COMEY: Not unless your Honor has any further

1 questions.

2 THE COURT: I don't.

3 MR. BARKET: If I --

4 THE COURT: Absolutely. Take your time.

5 MR. BARKET: One thing, quickly, your Honor. The
6 only point the distinction I would draw from the prosecutor is,
7 when they say that every witness statement provides a potential
8 nugget that we could use differently. Well, that's certainly
9 true. We're not talking about the entire body of their case.
10 We're, obviously, just talking about the fairly narrow body of
11 evidence that leads to the conclusion or establishes the fact
12 that Nick wasn't present when three individuals were shot.
13 That's the body that we're talking about. So we're not -- the
14 slippery slope ends there. There's another cascade, if you
15 will, another cliff, I suppose, you can fall off of, but the
16 information we're seeking in this instance just relates to
17 that, in our view, exculpatory fact. There's been -- I guess
18 your Honor has said this a few times and the government just
19 said it, that we know when and where these individuals were
20 shot. That's not something Nick has ever known.

21 THE COURT: I haven't --

22 MR. BARKET: So we don't know where he was when they
23 were shot, because we don't know when they were shot. There's
24 some information that we can glean from the government's
25 submission --

1 THE COURT: Yeah.

2 MR. BARKET: -- that they were -- just to be specific
3 about it, am I permitted to read from their submission?

4 THE COURT: Yeah, yeah, of course. Yes. That's not
5 filed under seal or anything; right?

6 MS. COMEY: That's fine, your Honor. It's public.

7 MR. BARKET: So they indicate that after Nick left --

8 THE COURT: I'm sorry, is this the October 19th
9 letter or is it some other letter that --

10 MR. BARKET: October 19th letter.

11 THE COURT: Yes, okay, but what page are you on?

12 MR. BARKET: Page 2 of 6.

13 THE COURT: Okay.

14 MR. BARKET: It says here that, after Nick left that
15 the other three individuals were shot and killed at the bar.

16 Now, that fact or that statement in there is, I
17 think, the first time that I've seen that put definitively.
18 We've had previous conversations with the government about this
19 and it was their belief or understanding or assumption that the
20 individuals were shot at the bar, but the forensics don't bear
21 that out. The forensics that we've gotten so far only show the
22 DNA of the first individual, Martin, a very small amount of
23 what I believe is -- what they believe is his blood and DNA.
24 There's no blood or DNA of the other three individuals there at
25 all, at least not that I'm aware of. So assuming that they now

1 say, okay, they were shot there, it doesn't answer the question
2 when. This wasn't an open establishment. This was a bar that
3 had been closed for some time and it was opened up for specific
4 reasons.

5 So we don't know when they were shot. The idea that
6 Nick knows where he was when this all took place, presupposes
7 that he has a specific memory of these events, and I guess,
8 assuming guilt, he would, because it's not every day that
9 you're involved in the murder of one or four people. Assuming
10 innocence, it's another day in his life. He might remember
11 some specific, you know, I remember being at the bar with, my
12 brother's bar or whatever, but I don't remember everything I
13 did for the next week or so.

14 And the burial, as we understand it, took place
15 someplace between April 12th or 13th. I forget the date of the
16 disappearance, and when there was a satellite photograph that
17 shows some disturbance in the land about a week or ten days
18 later. There's a big window of when these individuals could
19 have been shot. In that one line, I'm assuming they wrote it
20 on purpose, but I don't know, from our conversations with them,
21 that that had moved from we think to we know.

22 THE COURT: The one line about that after -- the
23 sentence you read, After Tartaglione left with the first body,
24 Urbano Santiago, Miguel Luna and Hector Gutierrez, the others
25 were shot and killed at the bar.

1 MR. BARKET: Correct.

2 THE COURT: Okay.

3 MR. BARKET: That had always been kind of a working
4 theory, as I understood it from the government. If it's moved
5 from working theory to now we know, okay. Well, that's part of
6 the --

7 THE COURT: From speculation to fact.

8 MR. BARKET: At least --

9 THE COURT: Or theory to fact.

10 MR. BARKET: Their belief. We're going to present
11 this case to a trier of fact who will get to decide.

12 THE COURT: Right. And whether or not somebody was
13 there or not would be maybe a fact that they would have to --

14 MR. BARKET: Well, there would be evidence that would
15 suggest to them that they can draw that conclusion, or that
16 they can find that fact, however you want to phrase it.

17 But that information -- so, I guess the two points
18 that I wanted to make briefly -- that I failed at least the
19 briefly part was, we're not looking to dive into the entire
20 body of their case, just this information.

21 And, two, I mean, if they know when these individuals
22 were shot, that would certainly help us a little bit --

23 THE COURT: Okay.

24 MR. BARKET: -- in narrowing down.

25 MS. COMEY: Your Honor, it's noted in footnote one of

1 our letter, which says it's in the afternoon and evening of
2 April 11, 2016. That's always been the key time period. It's
3 highlighted in our search warrant application. It's
4 highlighted in the Rule 16 discovery. And we've made ourselves
5 available to discuss that in more detail.

6 They have certainly been provided with warrant
7 applications that walk through specific pieces of Rule 16
8 discovery and timestamps and times that are particularly
9 relevant.

10 And I'd also note, as I believe we've noted in our
11 submission to your Honor, that all of this is based on the
12 evidence currently available to us. We are always
13 investigating. But that is our theory of the case, as I stand
14 here today, given the evidence that we have.

15 MR. BARKET: Oh, thank you, that's certainly helpful.

16 One other, and we'll take them up on the offer to sit
17 down and chat in more detail about some of this.

18 We are going to ask, however, that your Honor -- we
19 understood that the government was going to provide to your
20 Honor the underlying statements and/or evidence or whatever it
21 is that's at issue here.

22 THE COURT: Yes. Right whatever it is.

23 MR. BARKET: Right. Not a summary of it. A summary
24 of it we kind of already sort of have.

25 THE COURT: Yes.

1 MR. BARKET: I thought that your Honor then would
2 have the opportunity to look at the specific statements, 302
3 reports, evidence, whatever it is, and then make a decision
4 following that *in camera* review.

5 It wasn't my understanding the government was simply
6 going to provide a summary of that, because that doesn't even
7 give your Honor the opportunity to look to see maybe there's
8 something there that really is exculpatory, and really should
9 be disclosed earlier. And your Honor is in, I think, a
10 slightly better position than the government is to view it from
11 the defense's eyes and no disrespect, but -- not as good as
12 position as us.

13 THE COURT: There's no question.

14 MR. BARKET: So I would like to it to move from
15 exclusively to them to at least you.

16 MS. COMEY: Your Honor, we provided the summary
17 because we believed it was much more efficient, but I'm happy
18 to provide your Honor with whatever notes or reports there are
19 to the extent you believe it would be helpful in reaching your
20 decision.

21 THE COURT: You know, I don't see the downside to
22 that. Efficiency is not a priority in the criminal justice
23 system. So let's be thorough.

24 I think that's a very good suggestion, Mr. Barket.

25 I thank you in advance for providing that, Ms. Comey.

1 MS. COMEY: And is this with respect to any witness
2 statements or also any Rule 16 discovery?

3 THE COURT: Why don't we do this. I think any
4 witness statements, we'll start with, and maybe the Rule 16
5 discovery after I read the witness statements, I may come back
6 and ask for some followup on any Rule 16 discovery, sort of
7 consistent with Mr. Barket's point about I can't wear your hat,
8 Mr. Barket, but at least I'm not wearing the prosecution hat.

9 At least I can see, after reading the full
10 statements, if there is Rule 16 material that I might want to
11 take a look at. Okay?

12 MR. BARKET: Just one other small point.

13 THE COURT: Yes.

14 MR. BARKET: If some of this information is actually
15 in the discovery already and already been provided to us, so
16 it's kind of in this -- it's not really a mountain yet, to be
17 honest, I mean, it will grow that big, I'm sure, but it's
18 substantial. What's the problem with saying --

19 THE COURT: You know, I meant to ask Ms. Comey that
20 question.

21 So, yes. What about that?

22 MS. COMEY: We're happy to, your Honor. We've met
23 with them multiple times, and our understanding was that they
24 already had seen that particular Rule 16 discovery. But I have
25 no problem doing that, your Honor.

1 THE COURT: Okay. I'm happy to schedule a criminal
2 equivalent of a mediation, if you want.

3 MR. BARKET: No, we have actually -- I think, at
4 least from my perspective, we've gotten along fine.

5 THE COURT: I'm not worried about that. I'm just
6 saying maybe to facilitate the provision of direction.

7 MR. BARKET: The what?

8 THE COURT: Providing direction.

9 MR. BARKET: Oh.

10 THE COURT: Where within the growing mountain one
11 might find the evidence that supports the disclosure that was
12 made.

13 MR. BARKET: I'd be happy to take the Court up on
14 that, but maybe to save the Court some time, we could get
15 together --

16 THE COURT: The reason I always offer that is because
17 the last thing people want to do is spend an afternoon with me.
18 It forces them to get together. So it looks like mission
19 accomplished.

20 MR. BARKET: Very well. Happy to spend an afternoon
21 with you.

22 THE COURT: Really don't want. There's ERISA cases
23 back there. There's patent cases back there. You don't want
24 to.

25 MR. BARKET: Those I don't want to spend time with.

1 THE COURT: Yes, you don't want to be around that.

2 All right. So Ms. Comey, I'm conscious of the fact
3 that we're upon the Thanksgiving holiday. When realistically
4 can you get me the sort of follow-up *in camera* review
5 materials?

6 MS. COMEY: May have I have a week, your Honor?

7 THE COURT: Yeah, that's fine. That okay with
8 counsel?

9 MR. BARKET: Of course, your Honor.

10 THE COURT: Ms. Comey, if you need more time, just
11 let me know.

12 Anything from either side?

13 Let me just say as a consumer of advocacy this was
14 advocacy at its finest. My questions are sharp, not because of
15 any other reason than I'm trying to fine tune the advocacy and
16 I thought the answers by all were well thought out and well
17 reasoned. So if this is a precursor of what's to come, then
18 this is going to be a good case from a lawyer's junky's
19 standpoint. So thank you counsel, to all of you.

20 MR. BARKET: Thank you.

21 MS. ALDEA: Thank you.

22 THE COURT: With that, I'll bid you a Happy
23 Thanksgiving.

24 MS. COMEY: Your Honor, should we schedule another
25 date?

1 THE COURT: Let me look at the materials first and
2 then try to schedule a date. Is that okay? Because also if
3 there's going to be a conversation between you all --

4 MR. BARKET: It would --

5 THE COURT: Well, let's give you a date. Let's just
6 give you a date to have on the calendar.

7 MR. BARKET: We've been conscious of not letting the
8 time become a relevant factor.

9 THE COURT: Yeah, yeah. That's fine. So let's give
10 you -- how much time do you think you all need to have a chat?

11 MR. BARKET: I'm assuming we can do it sometime
12 before Christmas, or the end of the year. So sometime in
13 December.

14 MS. COMEY: Yes, your Honor.

15 THE COURT: Okay. Towards the end, I take it.

16 MR. GOLTZER: Excuse me, Judge.

17 THE COURT: Yes.

18 MR. GOLTZER: I'm out of the country December 21 to
19 January 2. I don't know if Mr. Stern's available. We would
20 like to be here.

21 THE COURT: Of course, of course.

22 I can tell you we just had a civil trial go away that
23 was supposed to start January 3rd, so we can do January 3rd; is
24 that okay with you all?

25 MS. COMEY: I'll be out of the country that week,

1 your Honor, but Mr. Gerber might be --

2 MR. GOLTZER: We don't need --

3 THE COURT: Yes, nobody wants Gerber. I'm sorry,
4 when were you out of the country, 20th to 21st?

5 EURBGS: I'm coming back the 1st of January.

6 THE COURT: So what if we did December 19, does that
7 work?

8 MR. BARKET: Yes.

9 THE COURT: Everybody's in the country?

10 MS. COMEY: Yes, your Honor.

11 MR. GOLTZER: Thank you, Judge.

12 THE COURT: Okay. All right. So let's say
13 December 19, 3:00.

14 MR. BARKET: That's fine, Judge.

15 THE COURT: Is that okay?

16 MR. BARKET: Yes.

17 THE COURT: All right. And I think time is
18 technically excluded anyway, but I'm going to prospectively
19 exclude time from now until December 19th, finding it's in the
20 interest of justice to do so.

21 There are a number of reasons for that: One is
22 there's a motion pending; two is that the capital review
23 process is ongoing, both in Washington and still here in
24 New York.

25 Right, Mr. Goltzer?

1 MR. GOLTZER: Yes.

2 THE COURT: Got it. And then third, of course, is
3 there needs to be time for counsel to review the discovery and
4 continue to prepare the defense of their clients.

5 So for all these reasons: The interest of justice
6 from this exclusion outweigh each defendant's and the public's
7 interest in a speedy trial, and the findings made pursuant to
8 18 USC Section 3161(h) (7) (a).

9 With that, we're adjourned.

10 MR. BARKET: Thank you, Judge.

11 MS. COMEY: Thank you, your Honor.

12 (Proceeding concluded)

13 CERTIFICATE: I hereby certify that the foregoing is a true and
14 accurate transcript, to the best of my skill and ability, from
my stenographic notes of this proceeding.

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Angela A. O'Donnell, RPR, Official Court Reporter, USDC, SDNY

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